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TENTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

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I. INTRODUCTION

A. Prevention

1. In the most recent discussion of the treatment of prevention in the ninth report a dual observation was made. On the one hand, it was said that an overall picture of the obligation of prevention was not provided, which meant that two extremes were called for: (a) the enunciation of some principles: "starting with the obligation of prevention linked to liability as a result of the risks involved in the activities envisaged. That would mean combining articles 3 (first para.), 6 and 8, including the provisions of article 2 (a) and (b), already referred to the Drafting Committee in that part of the draft"; (b) "the explicit statement of another basic general principle, namely, that, if the State in whose territory the activity involving risk took place did not fulfil its obligations of prevention, its liability for failure to do so would be incurred". 1/

2. The Special Rapporteur believes that the comment set out in subparagraph (a) above should be taken into account by the Drafting Committee when considering the provisions in question: the material exists and the comment did not indicate that anything of importance was missing. The view expressed in subparagraph (b) above is dealt with in the present report since this type of liability arises from the failure to fulfil obligations of prevention.

3. One issue outstanding was what was referred to as prevention ex post, which will be dealt with in section II of the present report.

B. Liability

4. As the reader will remember, at its 2282nd meeting, held on 8 July 1992, the Commission adopted a number of decisions on the scope of the topic. In item (iii), after stating that "attention should be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm", the International Law Commission stated that:

> "The articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will then decide on the next stage of the work."

1/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), paras. 130-131.

5. Once consideration of the issue of prevention has been completed, by means of a discussion of the response measures proposed in section II of the present report (as I attempt to demonstrate, whatever they are called, the measures in question will not under any circumstances be measures to repair transboundary harm), the two types of liability to which our articles would give rise must be considered: State liability for the failure to fulfil obligations of prevention, which constitutes liability for a wrongful act, and the liability in principle of the private operator.

6. Then the relationship between the two types of liability must be considered, as well as the provisions common to them. Lastly, the present report will consider the issue of the available procedural means of enforcing liability, but without proposing articles as yet, and will explore colleagues' positions on the main approaches that could be taken.

II. RESPONSE MEASURES

A. Another look at "prevention ex post"

7. In the most recent discussion, some Commission members expressed strong opposition to the idea of including in the chapter on prevention proper what was referred to as "prevention ex post", namely measures to be adopted after an incident has occurred, to reduce or control its effects and thus avoid greater harm, or even - as we shall see - completely avoid the transboundary harm that would occur if such measures were not taken. The Drafting Committee opted for the approach taken by these members - hence the text proposed for article 14, which deals only with prevention ex ante, or measures to prevent incidents.

8. Although only measures taken prior to the incident can be referred to as "prevention" the Special Rapporteur believes that what we have identified as "prevention ex post" is none the less still not reparation and that we therefore cannot include it in the chapter on reparation without making a methodological error.

9. Close examination reveals that incidents such as the ones dealt with under our topic are actually at the beginning of a cause-and-effect chain, which ends with the harm. An incident has certain effects on the natural world, which in turn produce further effects: all these effects fall within the sphere of natural causality. In a given link in this causal chain, however, some effects are regarded as legally relevant: they constitute harm and must be repaired. Harm is a legal concept, but it represents actual events.

10. By way of illustration: an incident that occurs as a result of an industrial activity leads to pollution of the waters of an international river. The pollution does not as yet represent transboundary harm. The activity-pollution causal chain is still manageable, so transboundary harm is avoided if the pollution does not reach the frontier or is reduced, or controlled, and as a result of such steps the pollution is dealt with within the territory of the country in question. Such steps are preventive because their purpose is to prevent, either completely or partly, harm that has as yet not occurred, even though the incident itself has already occurred. Thus, measures that could even

be regarded as rehabilitative in the State of origin can be of a preventive nature in the context of transboundary harm, since they prevent or reduce the scale of such harm. And the focus of our topic is transboundary harm.

11. It is thus clear that the concept of prevention is strictly applicable both to activities to avoid incidents that can lead to transboundary harm and to activities to prevent the effects of the incident from reaching their full potential. Prevention of incidents, or prevention ex ante, is just one aspect of prevention in general, which would include prevention ex post, because the fewer incidents there are, the less harm there will be. It is thus not possible, methodologically, to include in the chapter on reparation actions ex post to prevent harm.

12. International instruments dealing with such measures always refer to them as preventive, and instruments dealing only with liability view them in the context of the compensation to be paid for the cost of taking them.

B. Further review of international practice

13. Having rapidly reviewed such instruments, we note that the Convention on Civil Liability for damage resulting from activities dangerous to the environment, of the Council of Europe, states in article 2, paragraph 9: "'Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimize loss or damage as referred to in paragraph 7, subparagraphs (a) to (c), of this Article". The subparagraphs referred to deal with the three items into which the concept of "damage" is divided in the Convention. As it happens, paragraph 7 (d) of article 2 includes in the concept of "damage" subject to compensation "the costs of preventive measures", and the costs in question can only be costs incurred after the incident, because they are covered by the reference made in paragraph 9.

14. The proposed amendment to the Paris and Vienna Conventions on nuclear damage, prepared by the drafting committee of the standing committee of the International Atomic Energy Agency (IAEA) on liability for nuclear damage, identified as attachment II.A, suggests the following subparagraph (m) as an addition to article I, paragraph 1 (k): "'Preventive measures' means any reasonable measures taken by any person after a nuclear incident has occurred to prevent and minimize damage referred to in subparagraphs (k)(i) to (iv) above". Article I, paragraph 1 (k), contains a subparagraph (v) which includes, under the meaning of "nuclear damage", "the costs of preventive measures" defined earlier. And in the draft identified as attachment II.B ("Pool" draft) article 3 contains a paragraph 2, enclosed in square brackets, reading: "the damage referred to in paragraph 1 above includes the cost of preventive measures, wherever taken, to prevent or minimize such damage and further loss or damage caused by such measures".

15. The Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources states, in article 1, paragraph 6:

"'Pollution damage' means loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation and includes the cost of preventive measures". And paragraph 7 reads: "'Preventive measures' means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize pollution damage."

16. The Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) uses a similar formulation in article 1, paragraphs 10 and 11, dealing with the concept of damage, which includes the costs of preventive measures defined exactly as in the earlier cases ("reasonable measures taken by any person after an incident has occurred to prevent or minimize damage").

17. Instruments dealing mainly with prevention of transboundary harm also cover not only prevention of incidents but also prevention of harm, and tend to use such wording as "prevent, reduce and control" in referring to prevention in the broad sense. The United Nations Convention on the Law of the Sea uses such wording so frequently in part XII, on the protection and preservation of the marine environment, that it is superfluous to quote the relevant passages. Such wording is clearly used in order to describe the equivalent of the "preventive measures" dealt with in the above-mentioned instruments on liability, and it does not by any means cover responsibility and liability, which the Convention on the Law of the Sea deals with in a separate article (art. 235).

18. The 1991 Espoo Convention on environmental impact assessment in a transboundary context - which, as we saw in the ninth report, deals only with prevention and not with liability - refers to the parties' obligation to take appropriate and effective measures to prevent, mitigate and monitor significant adverse environmental impact. Lastly, the 1991 Helsinki Convention on the transboundary effects of industrial accidents, despite having as its chief goal the prevention of industrial accidents, gives us an idea of how relative the concept of prevention is, since it indicates in article 3, paragraph 1, that the purpose of the Convention is "to protect human beings and the environment against industrial accidents by preventing such accidents as far as possible, by reducing their frequency and severity and by mitigating their effects. To this end, preventive, preparedness and response measures, including restoration measures, shall be applied".

C. "Response" measures

19. Such terms as "response measures", used in the article just quoted, are used in other conventions - for example, the Convention on the Regulation of Antarctic Mineral Resource Activities (RAMRA), which in referring to such measures in article 8, paragraph 1, states that "an operator undertaking any Antarctic mineral resource activity shall take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystems". Clearly, the word "prevention" is used here in the sense of "prevention ex post", but some types of measures that do not constitute prevention ex post are regarded as response

action, as in the case of clean-up and removal whose purpose is not to limit or minimize transboundary harm.

20. If, in order to refer to these measures ex post, we are to continue to use a term that differs from the term used in all the relevant conventions (preventive measures), while accepting that the measures in question do not fall within the sphere of reparation, we must find a different term. One option is to include such measures under the concept of response measures - a concept that must be defined in article 2 of our draft as covering only what we have referred to as prevention ex post - to confine that concept to measures taken in response to an incident with a view to limiting or minimizing its adverse effects and the resulting transboundary harm. We have already provided a number of examples, but it should be added that response measures include a number of measures that would be strictly of a preventive nature - such as felling trees in, and clearing, a strip of woodland in order to prevent fire from spreading to a neighbouring country - and other measures that could constitute restoration in the case of the State of origin but prevention in the case of the affected State: for example, in the case of an international river, the conditions that prevailed prior to an incident are re-established, thus preventing the river current from continuing to carry to the neighbouring country the rest of the resulting pollution. It would suffice to clarify that the purpose of this concept is to limit or minimize transboundary harm after the incident has occurred.

21. Such measures may be taken by the State itself in some circumstances, or by private parties. If necessary, in some cases the State will use firefighters or the army to deal with consequences of an incident that threaten to spread to a neighbouring country, as in the case of a forest fire resulting from an industrial accident, or massive pollution of a river also resulting from an accident while an activity under article 1 is being carried out. Possibly, however, the affected State will take identical measures in its own territory and thus manage to avoid greater damage, or private parties in either State will take such measures on their own initiative. In such cases the party that is ultimately liable and must pay the corresponding compensation must also bear the cost of such measures - which we would refer to as "response" measures - provided that it was reasonable to adopt the measures.

D. Proposed text

22. In the light of the foregoing, the Special Rapporteur proposes the following text:

"Use of terms

"For the purposes of the present articles:

(e) 'Response measures' means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.

(x) The harm referred to in subparagraph (y) includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused."

The letters "x" and "y" represent the letters that will identify the relevant subparagraphs once article 2 has been finalized.

III. STATE LIABILITY

A. Liability in general

23. We have thus completed the section on prevention, both of whose aspects we have considered: prevention of incidents, and preventive response measures taken after an incident has occurred, in order to minimize or prevent the harm resulting from the incident. The content of the liability itself will take shape once the concept of harm is completed in our articles. In the area of harm to the environment, which is the most novel and fluid harm category, there can be other "remedial measures" 2/ (as they are called in English) - a term that conveys well the idea that there can be remedial measures other than monetary compensation, as in the case of certain measures to restore the environment that are being worked on currently in a variety of forums. However, for the time being the chapters on liability deal only with its attribution, whatever its content may be, in the event of failure to fulfil obligations of prevention (the subject of the present section) and where there are incidents caused by an activity under article 1 (the subject of the next section).

B. Relationship between State liability and civil liability

1. Explanatory comments

24. In order to be able to establish the liability of the State in our articles, we must begin by drawing attention to the fact that in the articles State liability for a wrongful act (breach of obligations of prevention) coexists with civil liability on the part of a private individual or private individuals (compensation for transboundary harm), or strict liability, which does not require failure to fulfil an obligation in order to be applicable.

25. There are other conventions in which both types of liability occur, but two very different kinds of situations regarding State liability must be identified:

(a) Situations where there is no State liability for a wrongful act. In general, the conventions dealing with liability for harm caused by dangerous activities do not cover obligations of prevention of the type covered by our articles; the State therefore either does not bear any liability, as in the case

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2/ This is what such measures were called in the decision adopted by the Commission on 8 July 1992, when it decided on future action under the topic.

of the Council of Europe Convention, or it bears strict, sole liability as in the case of space objects, or it bears residual liability in the context of the liability of the private party, with respect to the payment of compensation in connection with accidents resulting from the activities in question. This is so in the case of the Vienna and Paris nuclear conventions, under which, in our view, the liability of the State is both residual and strict;

(b) Situations where there is State liability for a wrongful act. The relevant instruments impose certain obligations on the State, and its liability is subsidiary to the civil (strict) liability of the private operator, but only in the event of an indirect causal link between the State's failure to fulfil its obligation and the occurrence of the harm.

26. Let us take a closer look at the foregoing:

(a) Situations where there is no State liability for a wrongful act. Many conventions on civil liability for dangerous activities differ from our draft in that they do not cover State obligations of prevention. State liability for failure to fulfil an obligation does not arise. The conventions in question also do not cover State liability subsidiary to the operator's liability for the payment of compensation in certain circumstances: the State is not involved. This is so in the case of the Council of Europe Convention on Civil Liability for damage resulting from activities dangerous to the environment;

(b) Situations where the State bears both strict liability and liability for a wrongful act. This situation applies in the case of the Convention on International Liability for Damage Caused by Space Objects. In the Convention liability for a wrongful act and strict liability exist side by side, but both involve the launching State, whose conduct will be subject to one or another regime depending on where the harm occurs: if the damage is caused on the surface of the earth or to aircraft in flight, liability will be "absolute"; 3/ but if the damage is caused to a space object of another launching State liability for fault will arise (see arts. II, III and IV of the Convention);

(c) Situations where there is strict liability on the part of the State but it is subsidiary to the operator's civil (also strict) liability for the payment of compensation in respect of incidents resulting from the dangerous activity. There is no State liability for a wrongful act. The Paris, Vienna and Brussels nuclear conventions, which also do not impose obligations of prevention on States, do in certain cases impose on States liability subsidiary to the operator's liability with respect to the payment of compensation for nuclear incidents. The private operator bears primary liability, but the State is liable in respect of the portion of the compensation not covered by the operator's insurance. We believe that this is strict liability on the part of

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3/ The Spanish term "responsabilidad absoluta" is a literal translation from English, and is not normally used in Spanish. Absolute liability is very strict liability, with very few or no exceptions.

the State, since the amounts for which the State is liable arise from strict liability on the part of the operator who has not met his obligations in that connection: the State does not have any special defence, it is in the position of the party originally liable, but residually;

(d) Situations where there is State liability for a wrongful act, but such liability is subsidiary to the operator's civil liability for harm caused by the dangerous activity. In article 8, paragraph 2, the Convention on the Regulation of Antarctic Mineral Resource Activities specifies certain types of damage in respect of which the operator bears strict liability. Paragraph 3, however, states that:

> "damage of the kind referred to in paragraph 2 above which would not have occurred or continued if the Sponsoring State had carried out its obligations under this Convention with respect to its Operator shall, in accordance with international law, entail liability of that Sponsoring State. Such liability shall be limited to that portion of liability not satisfied by the Operator or otherwise."

Such liability is based on a "substantial and genuine link" between the operator and its sponsoring State as established in article 1, subparagraph 12, and described in subparagraphs 11 and 12. Moreover, the sponsoring State's obligations are towards its operator. Also, in the draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, both strict liability on the part of the private party liable or of the Fund and State liability for a wrongful act are involved in the payment of compensation, even though the State's obligations are not necessarily towards its operator but rather constitute general obligations. There are two preconditions for residual State liability: first, that the State has failed to fulfil one of its obligations and that, had it not been for this failure, the damage would not have occurred (indirect causality) 4/ and, second, that full

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4/ Document UNEP/CHW.1/WG.1/1/3, p. 2, para. 5 states:

> "Taking into account the fact that the aims as well as the obligations of the Basel Convention are addressed to the States Parties which exercise decisive control over all transboundary movements of hazardous wastes and their disposal, it is proposed that States should be deemed to incur liability for damage, but only to the extent that such damage is causally related to the State's failure to comply with its obligations under the Basel Convention. Therefore, contrary to the proposed system of civil liability, state liability should be fault-based and not based on strict liability."

Paragraph 7 proposes complementing article 9 on State liability as follows:

> "(a) Damage which would not have occurred if the exporting State had carried out its obligations under the Convention with respect to the transboundary movement and disposal of hazardous wastes shall entail the liability of the exporting State. Such liability shall be limited to that portion of damage not satisfied under the civil liability or the fund provisions of the protocol."

compensation cannot be paid by the operator or his insurance (or the compensation fund scheme, if there is one).

27. Alternative (a) is not relevant to our draft, which covers obligations of prevention. Alternative (b), which holds the State fully liable, is only justified in such instruments as the space objects convention, which imposes all the liability for any such activity on States. Alternative (c), that is, strict but residual State liability, is consistent with the kind of liability that must be assumed in connection with activities involving risk and which might be necessary where there is a potential for disastrous transboundary harm and insurance is not sufficient to cover the enormous compensation required but which might encounter resistance by those who refuse to assign to the State a kind of liability, which, in their view, is not well-established in international law. There might also be other possibilities for residuality: a standing committee now in the process of amending the Vienna and Paris Convention is working out promising solutions, e.g., bringing in, at certain levels, a consortium of all Member States or a consortium of all liable private parties from all Member States. This form of socialization of the harm is in keeping with the basic philosophy underlying all dangerous activities which, after the advantages are weighed against the disadvantages, are authorized because they are useful to society (national or international society, as the case may be). No one, not even the operator, should have to shoulder the costs associated with the harm caused by accidents inherent in the activity; such costs should be borne by society as a whole, which benefits from the activity. The advantage of channelling liability towards the operator - which is recognized by authors who have written on these topics - is that the operator is in the best position to offset the cost of the risk involved by factoring it into the price of his goods or services.

28. With regard to alternative (d), which introduces residual State liability for a wrongful act, the question arises as to whether this category of liability for supplementing the compensation paid in order to provide fuller restitution for the harm would to some extent run counter to its own purposes, namely, the establishment of a comprehensive regime which would not leave innocent victims unprotected. Indeed, liability for a wrongful act requires, as we have seen, a certain amount of proof which it would not be easy for the victims to obtain. It is for this very reason that, traditionally domestic law and, more recently, international practice have preferred reparation by the liable party or by his insurance. If the aim is to help the victim secure reparation, why place the obstacle of onus probandi in his path? 5/

5/ There are interrelated concepts which might warrant consideration in one of the Special Rapporteur's next reports: the establishment of a compensation fund which would also include a consortium of liable private parties. It is difficult to make such institutions work in a comprehensive system which covers all dangerous activities and any attempt to do so might be futile. A permanent body to promote the adoption of protocols and oversee the application of the articles could be contemplated. The Council of Europe Convention introduces a standing committee to consider questions of a general nature concerning interpretation or implementation of the Convention and propose amendments to it, including its annexes. This is the current trend in

29. None of the foregoing alternatives, then, seems to be entirely suited to our purposes, although alternative (d) could be considered. It would be simplest, however, not to impose any form of strict liability on the State and to draw the sharpest possible distinction between its liability for its failure to fulfil its obligations (liability for wrongful acts) and strict liability for harm caused by incidents resulting from the risk involved in the activity in question. Liability would be incurred in any case by the liable private party and, possibly - if the ideas expressed in footnote 7 are accepted - by a group of liable parties. The advantage of this system would be to simplify the relationship between State liability and the liability of private parties and, perhaps, to make the draft more acceptable to States. It would also simplify the procedural aspects, as will be seen in section VI, since only domestic courts would be competent and such thorny issues as that of a State appearing before a court in a case involving a private party, particularly if it had to do so in the domestic courts of another State, would not arise.

2. Proposed text (alternatives A and B)

30. We therefore submit to the Commission an alternative which is somewhere in between the two systems by formulating the article as follows:

"STATE LIABILITY

"Article 21

Alternative A:

"Residual liability for a breach by the State

Harm which would not have occurred if the State of origin had fulfilled its obligations of prevention in respect of the activities referred to in article 1 shall entail the liability of the State of origin. Such liability shall be limited to that portion of the compensation which cannot be satisfied by applying the provisions on civil liability set forth herein."

(continued)

environmental protection conventions; while our draft is not concerned exclusively with environmental protection, the concept of liability for environmental harm was welcomed by the Commission and by the General Assembly and necessarily moves us right into the area of environmental protection.

Alternative B

"The State of origin shall in no case be liable for compensation in respect of harm caused by incidents arising from the activities referred to in article 1."

C. State liability for wrongful acts

1. Explanatory comments

31. Having established the State's obligations of prevention in the ninth report, we must now consider the potential consequences of its failure to fulfil those obligations. Normally, they would be the consequences laid down for a breach in part two of the draft articles on State responsibility, provisionally adopted in the most recent debate: cessation, restitution in kind or equivalent compensation, satisfaction and guarantees of non-repetition.

32. It should be recalled that, in our articles, the relationships which arise from the failure to fulfil obligations of prevention are between States. Individuals do not enter into the picture here; we are operating at the international level. We should draw a clear-cut conceptual distinction between this type of liability and liability arising as the result of an incident occurring in the course of an activity under article 1, which has caused transboundary harm and for which civil liability or liability on the part of a private party would be incurred.

33. In the first place, the State of origin will be under an obligation to cease the conduct constituting a wrongful act having a continuous character. This continuous act would generally consist in the State's failure to take the measures required by our draft, 6/ and its cessation would be in keeping with one view expressed during the debate that a dangerous activity performed without the appropriate precautionary measures being taken ceases to be a lawful activity under international law. It is understood that the wrongful act in question must be duly proved to be such and that a lawful activity of the State of origin therefore cannot be vetoed by the affected State.

6/ The author wishes to place on record his own doubts as to whether an omission can constitute a continuous breach of an obligation: once an obligation to take action has been breached, that primary obligation is immediately replaced by a secondary obligation which is similar but not necessarily identical in content. It can, for example, also include an obligation to pay interest or in some other way compensate for the damage caused by the breach within the time-period established for the fulfilment of the primary obligation or, possibly, lucrum cessans. In its discussion of the topic of State responsibility, however, the Commission has acknowledged that omissions could give rise to continuing breaches.

34. The State injured by the breach can request that all appropriate forms of reparation be made, as provided for in the current formulation of articles 7, 8, 10 and 10 bis of part two of the draft articles on State responsibility. In addition, however, the injured State would be able to take the appropriate steps following a breach of an obligation, that is, it would have the right to take any appropriate countermeasures under the same general conditions of lawfulness to which countermeasures are subject under international law.

35. We must remember that the obligations of prevention we have imposed on States in the relevant chapter are not obligations of result: we are merely requiring States to attempt to prevent accidents and harm. Violation of these obligations is therefore distinct from the actual occurrence of harm as a result of an incident which occurs during the performance of the activity in question. Should such harm occur, strict liability - liability on the part of a private party in the case of our articles - should immediately begin to operate.

36. For example, if the State of origin allows an activity under article 1 to be carried out without prior authorization - that is, where the operator has not applied for authorization and, in order to obtain it, described the features of the activity or conducted the risk assessment required under article 12 - it would not be complying with that obligation. The occurrence of an incident would automatically impose strict liability on the operator, but the State would remain liable for the breach itself. This means that the affected State could make diplomatic representations and take such steps - for example, countermeasures - as are necessary to make the State of origin fulfil the requirement in question by ceasing the wrongful act, on penalty of possibility of the activity being declared unlawful.

37. And if neither the incident nor the transboundary harm occurs, the affected State can make the same representations and take the same steps, with the same results. For example, if the State of origin allows an activity under article 1 to be carried out without prior authorization - that is, where the operator has not applied for authorization and, in order to obtain it, described the features of the activity or conducted the risk assessment required under article 12 - it would not be complying with that obligation. The occurrence of an incident would automatically impose strict liability on the operator, but the State would remain liable for the breach itself. This means that the affected State could make diplomatic representations and take such steps - for example, countermeasures - as are necessary to make the State of origin fulfil the requirement in question by ceasing the wrongful act, on penalty of the possibility of the activity being declared unlawful.

38. Here let us digress briefly in order to justify the above assertion more fully. In the ninth report, we said that obligations of prevention and obligations of due diligence and that this has its consequences. We should, first and foremost, distinguish obligations of prevention from obligations of result under article 23 of part one of the draft articles on State responsibility, that is, from obligations concerning the prevention of a given event, with which they might be confused.

39. In the case of obligations concerning the prevention of a given event, only the occurrence of an event which there was an obligation to prevent would constitute a violation: its occurrence is a necessary condition. This is what the Commission's report has to say:

> "The State bound by an obligation of this kind cannot claim to have achieved the required result by seeking to prove that it has set up a perfect system of prevention if, in practice, this system proves ineffective and permits the event to occur. Conversely, the State having an interest in the fulfilment of the obligation cannot claim that the latter has been breached solely because the system of prevention set up by the obligated State seems to it to be clearly insufficient or ineffective, so long as the occurrence the system was supposed to prevent has not taken place."

And note 397 states that: "obligations requiring the prevention of given events are therefore not the same as those which are commonly referred to by the blanket term 'obligations of vigilance'. The commission of a breach of the latter obligations often consists of an action or omission by the State and is not necessarily affected by whether an external event does or does not take place. 7/ It should be explained that "vigilancia" is the Spanish translation of "due diligence" in the English text. This seems to be the primary difference between obligations of result and obligations of due diligence in the system laid down in part one of the draft articles on State responsibility: in the case of obligations of result, for there to be a breach, the result - positive or negative - must not have been achieved, whereas in the case of obligations of due diligence, this requirement is not necessary and the means employed are considered directly in order to determine whether or not they are those which should have reasonably been used in order to achieve the result required by the obligation.

40. It is even conceivable that the State could be liable for some form of compensation to the State of origin where no incident has occurred and there is no strict liability on the part of the private party responsible. Supposing that the failure of the State of origin to require the taking of certain preventive measures by operators carrying out a dangerous activity in its territory has compelled the exposed State or the persons residing therein to take certain measures in the latter State's territory to prevent or minimize the harm that an incident occurring as a result of that activity might cause them. This is perfectly possible and would mean that the exposed State has had to incur certain costs owing to the indirect causality constituted by the omission on the part of the State of origin. The compensation for which that State would be liable would be an example of equivalent compensation.

7/ Yearbook ... 1978, vol. II (Part Two), chap. III.B.2, commentary to article 23, para. (4), in fine and note 397.

2. Proposed text

41. The foregoing could be expressed in an article which would follow the last article on prevention, currently under review by the Drafting Committee. Its text could simply refer to the applicable international law even though such a reference might seem unnecessary to some: there is no need for a contractual provision in order to ensure the implementation of rules of customary law relating to the consequences of such breaches. We thus prefer either to make no mention at all of the consequences of the breach of the provisions of the article or simply to defer to international law: if we were to reproduce the applicable articles on State responsibility in our draft, even with appropriate drafting changes, we would be adopting texts which are not final and are subject to change both on the second reading of the draft in the Commission and during any codification conference which is convened. Should the Commission therefore opt simply to refer to international law, the following might be an acceptable text:

"Article A

International State liability

The consequences of a breach by the State of origin of the obligations of prevention laid down in these articles shall be those consequences established by international law for the breach of international obligations."

IV. CIVIL LIABILITY

A. Strict liability

42. Activities involving risk call for the strict liability that has become widespread in national legislation for reasons which are well known, including the need for an expeditious process that dispenses with the need for demonstration of a breach of an obligation or fault. In international law, the same arguments have been used to establish the civil liability of the private party in conventions on which we have provided frequent comments throughout our reports. Even though it was elaborated several years ago, paragraph 4 of the draft directive of the Commission of the European Communities on civil liability for damage caused by wastes 8/ makes convincing arguments in favour of strict liability:

8/ Document COM (89) 282 final-SYN 217.

"No-fault or strict liability

As this principle implies automatic liability, it will ensure that victims receive compensation, the environment will recover and economic agents are held liable in keeping with the objectives of the Directive.

The concept of no-fault or strict liability for environmental risks is everywhere gaining ground. In the related (and comparable) field of defective products, Council Directive 85/374/EEC of 25 July 1985 adopts this principle, and it can also be found in a growing number of international conventions, e.g. on nuclear energy and oil pollution of the seas. The draft convention prepared by Unidroit on compensation for damage caused by the carriage of dangerous goods by rail, road or inland waterway, currently being negotiated within the United Nations Economic Commission for Europe, is also based on the same principle.

In the same spirit, the final communiqué of the 8th Conference of Ministers on the Protection of the Rhine against Pollution in Strasbourg on 1 October 1987, which was also attended by the Commission, calls for harmonization of legislation on civil liability for damage caused by dangerous substances on the basis of the principle of strict liability.

The same trend is becoming increasingly established in national legislation. Germany and Belgium have already introduced the principle of no-fault liability. In France, it is well established by case-law. Case-law in the Netherlands is moving in the same direction and a law is being drafted to introduce the principle in the new Civil Code. In Spain, strict liability has been introduced in the waste management sector."

The end result of the draft international instruments mentioned in these paragraphs was that strict liability was adopted.

B. General characteristics of the regime

43. A number of features common to civil liability conventions emerge from a review of international practice in this field. Some of them are summarized in the Code of Conduct on Accidental Pollution of Transboundary Inland Waters. This Code of Conduct is of interest to us because, like our draft, it concerns activities involving risk which may accidentally cause transboundary damage (in this case through pollution). Article XV, paragraph 4 of the Code aptly summarizes the proper course of action in this regard:

"In order to ensure prompt and adequate compensation in respect of all damage caused by accidental pollution of transboundary inland waters, countries should in accordance with their national legal systems provide for the identification of the physical or legal person or persons liable for damage resulting from hazardous activities. Unless otherwise provided, the operator should be considered liable; and where more than one organization or person is liable, such liability should be joint and several."

Paragraph 5 reads: "Countries should provide strict liability for pollution damage caused by accidents involving hazardous activities". And paragraph 6 reads: "where the incident from which the damage resulted cannot be identified ... countries should, inter alia, consider the establishment of compensation funds." (Emphasis added). 9/

44. Liability is thus strict where the operator must be identified in the convention or in internal law, and is joint and several where a number of operators are involved. Where possible, compensation funds should be established. In addition, however: (a) the operator is invariably obliged to take out insurance or to provide some other financial guarantee to cover either a sum equal to the maximum compensation - where there is a fixed limit - or another sum to be determined by the national authority; (b) in order for this system to function, the principle of non-discrimination must be respected, in other words, the State of origin should treat in the same manner in its courts both residents in its territory and non-residents; (c) States parties should ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of transboundary damage caused, as provided in article 235 of the United Nations Convention on the Law of the Sea; (d) in all matters not directly governed by the Convention the national law of the competent jurisdiction is to be applied, provided that such law is consistent with the provisions of the Convention; (e) judgements which are enforceable in one jurisdiction are to be equally enforceable in all jurisdictions, except where otherwise provided; (f) there must be unrestricted transfer of the amounts of money awarded in a judgement rendered in one of the States to any other State party in the currency desired by the beneficiary of the award.

45. Limitations in the form of exceptions and prescription must apply to both State and civil liability.

C. Liable parties: "channelling" of liability

1. Explanatory comments

46. As we have seen, it is important to establish who is to be liable in principle, within the State of origin, for the transboundary harm, in order thereby to facilitate action by the victims. This procedure is followed in all conventions on civil liability in which liability is "channelled" or "directed" towards certain persons: the victims must direct their action against the operator who is liable or against his insurer or financial guarantor, but not against other persons. Normally, the operator has the recourse of initiating in turn a claim against whomsoever he may be entitled so to do (for example, against a supplier who sold him defective material which caused the accident), with the exception of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1960 Paris Convention on third-party liability in the field of nuclear energy, the Brussels Convention on the Liability of Operators of Nuclear

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9/ E/ECE/1225-ECE/ENVWA/16, pp. 16-17.

Ships, as well as the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, in which, perhaps owing to the magnitude of the risks and corresponding insurance premiums, the operator is deprived of this possibility and thus remains the only party who needs to be insured.

47. Normally, the party which has control over the activity at the time at which the incident occurs is liable. Normally, also, the party which has control is the operator. Some conventions provide for a presumption: the party which has control is the one which appears in the public register of the State of origin as the owner of the installation, or of the vessel, etc., and where such registers do not exist the owner is presumed to have direct control (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 1952, arts. 2.1, 2.2 and 2.3; CRTD, art. 1.8).

48. A number of instruments also provide for cases in which damage is caused by a continuous situation or by a series of incidents of the same origin (Council of Europe Convention on Civil Liability for damage resulting from activities dangerous to the environment, art. 6, paras. 1-4; Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, art. 3).

49. Undoubtedly, the instrument that is most helpful in determining liability is the Convention on Civil Liability for damage resulting from activities dangerous to the environment, elaborated by the Council of Europe, since it seeks to cover all dangerous activities, as our draft does.

50. It begins by announcing in its preamble the regime of strict liability "taking into account the 'Polluter Pays'" principle and recalling Principle 13 of the 1992 Rio Declaration on Environment and Development:

> "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage; they shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction".

51. Article 2, which contains definitions, states that "operator" means the person who exercises the control of a dangerous activity. In article 6, on liability, the first three paragraphs are of particular interest:

> "1. The operator in respect of a dangerous activity mentioned under Article 2, paragraph 1, subparagraphs (a) to (c) shall be liable for the damage caused by the activity as a result of incidents at the time or during the period when he was exercising the control of that activity.
>
> 2. If an incident consists of a continuous occurrence, all operators successively exercising the control of the dangerous activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the

control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.

3. If an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence at the time when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only."

52. Paragraph 4 is applicable to a dangerous activity which has definitively ceased in a given installation or on a given site. In such case, where damage results from the activity, "the last operator of this activity shall be liable for that damage unless he or the person who suffered damage proves that all or part of the damage resulted from an incident which occurred at a time before he became the operator. If it so proved, the provisions of paragraphs 1 to 3 of this Article shall apply".

53. Moreover, article 7 refers to the liability of the operator of a site for the permanent deposit of waste. The last two points are supported by the Council of Europe Convention, since the definition of "activities dangerous to the environment" in article 2 explicitly includes in paragraph 1 (c): "the operation of an installation or site for the incineration, treatment, handling or recycling of waste ..." and in paragraph 1 (d) "the operation of a site for the permanent deposit of waste". In our case, since we have still not completed the task of more precisely identifying the activities covered by the draft articles (we have merely established a threshold of "significant risk"), consideration of the concept contained in those two points will have to be deferred.

54. Article 7, paragraph 4 is also relevant: "Nothing in this Convention shall prejudice any right of recourse of the operator against any third party". This makes it clear that it is national law which must provide for the recourse in question and also that this Convention does not follow the model of the conventions on nuclear damage, in which the operator or his insurer must absorb the damage.

2. Proposed texts

55. In the light of the foregoing, the Special Rapporteur wishes to propose the following texts.

56. In article 2, on the use of terms, a paragraph should be inserted as follows:

"(x) 'Operator' means the person who exercises the control of an activity referred to in article 1."

57. The following articles numbered in accordance with the determination of the final text by the Drafting Committee should then be added:

"Article A

Liability of the operator

The operator of an activity referred to in article 1 shall be liable for all significant transboundary harm caused by such activity during the periods in which he exercises control of such activity.

(a) In the case of continuous occurrences, or a series of occurrences having the same origin, operators liable under the paragraph above shall be held jointly and severally liable.

(b) Where the operator proves that during the period of the commission of the continuous occurrence in respect of which he is liable only a part of the damage was caused, he shall be liable for that part.

(c) Where the operator proves that the occurrence in a series of occurrences having the same origin for which he is liable has caused only a part of the damage, he shall be held liable for that part."

"Article B

Recourse against third parties

No provision of these articles shall restrict the right of recourse which the law of the competent jurisdiction grants to the operator against any third party."

D. Obligation to purchase insurance

1. Explanatory comments

58. As we have seen before, in all civil liability agreements, the operator is required to take out insurance to pay compensation. Some agreements establish the amount of insurance coverage in relation to the limits on the compensation which, in certain cases, the national authorities may reduce, depending on their assessment of the danger posed by the activity in question. It would be difficult to establish such limits in an instrument such as ours, which is attempting to cover all dangerous activities, since they will vary from one activity to another. The Council of Europe Convention, which, as we have seen, is also of a general nature, does not do so.

59. Moreover, national authorities should be left free to fix the minimum amount of the insurance coverage or financial guarantee, on the basis of the result of their assessment of the risk inherent in the dangerous activities, as provided for in article 12.

60. The commentary to article 13 of the Council of Europe Convention 10/ reads as follows:

> "The Convention requires the Parties, where appropriate, to ensure under internal law that operators have financial security to cover the liability under the Convention and to determine its scope, conditions and form. In particular, the financial security may be subject to a certain limit.
>
> "The provision invites the Parties to take into account, in determining which activities should be subject to the requirement of financial security, the risks of the activity.
>
> "When implementing this article the following considerations can be taken into account. Firstly, the fact that certain activities in themselves involve an increased risk of damage. Secondly, that some firms may not have the financial capacity to pay compensation awarded to persons who have suffered damage in the absence of insurance or financial security and thirdly, to avoid any failure to apply the requirement arising out of the impossibility to foresee the risk and to establish a financial guarantee to cover that risk.
>
> "A financial security scheme or financial guarantees mentioned in this article, can exist in many different forms, e.g., an insurance contract, or a financial cooperation of operators who deal with a specific kind of dangerous activities, in order to cover the risks involved in these activities. Such financial schemes would have the function of guaranteeing compensation for the damage caused by a dangerous activity performed by one of those operators.
>
> "It would also be possible to cover the risks involved by an insurance contract. Another possibility could be that an operator has sufficiently large financial resources himself to cover the risks involved in the dangerous activities carried out by him.
>
> "It is likely that, after the entry into force of the Convention, the insurance market in the field of environmental damage will develop further since the risks and liability for pollution will become better known, and the finarcial security schemes can gradually be replaced by insurance contracts."

2. Proposed texts

61. In the light of the foregoing, the Special Rapporteur proposes the following articles:

10/ See supplement to CDCJ (92) 50, p. 50, para. 71.

"Article C

Financial securities or insurance

In order to cover the liability provided for in these articles, States of origin shall, where appropriate, require operators engaged in dangerous activities in their territory or otherwise under their jurisdiction or control to participate in a financial security scheme or to provide other financial guarantees within such limits as shall be determined by the authorities of such States, in accordance with the assessment of the risk involved in the activity in question and the conditions established in their internal law."

"Article D

Action brought directly against an insurer or financial guarantor

An action for compensation may be brought directly against the insurer or another person who has provided the financial security referred to in the article above."

E. Competent court

1. Explanatory comments

62. Existing conventions differ in the choice of jurisdiction they offer the injured party. The Paris and Vienna conventions on nuclear damage (arts. 13 and XI, respectively) limit the choice to the competent court of the State where the nuclear installation is situated. The draft protocol of the ad hoc working group of legal and technical experts appointed by the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (art. 10) establishes three bases for jurisdiction: (a) where the damage was sustained; (b) where the damage has its origin; and (c) where the person alleged to be liable resides, is domiciled or has his principal place of business. The draft protocol also requires each contracting party to ensure that its courts possess the competence to entertain the claims for compensation in question. The Council of Europe Convention (art. 19) sets forth practically the same bases for jurisdiction as the draft protocol, except that it limits subparagraph (c) to the place where the defendant has his "habitual residence". Article 19 of CRTD establishes four bases for jurisdiction: (a) where the damage was sustained; (b) where the incident occurred; (c) where preventive measures were taken to prevent or minimize damage (what we call "response measures"); and (d) where the carrier has his habitual residence. Since the place where the damage has its origin (basis (b) in the draft protocol) is usually the place where the incident occurred (basis (b) in CRTD) and since the carrier in the latter case corresponds to the "person alleged to be liable" in the draft protocol, the new element CRTD has introduced is the jurisdiction of the court of the place where preventive measures were taken. The 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third

Parties on the Surface (art. 20) mentions only the courts of the State where the damage occurred, unless otherwise agreed. The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (art. 11) indicates that the competent courts are (a) the courts of any State party where damage was suffered as a result of the incident; or (b) the courts of the controlling State, defined in article 1, paragraph 4, as the State party which exercises sovereign rights for the purpose of exploring for and exploiting the resources of the seabed and its subsoil in the area in or above which the installation is situated. The "controlling State" in this formulation, being the State where the installation carrying out the polluting activity is situated, would appear to correspond to the "State of origin" in our draft.

63. The claimant should be allowed to choose between several jurisdictions, depending on which advantage is most important: (a) the courts of the State of origin, where it may be easier for the injured party to obtain evidence about the original incident; (b) the affected State, where it may be easier to assemble evidence of the harm, and where the injured parties are presumably more familiar with the relevant procedure, if they do in fact reside there. The claimant should find it easier to pursue his claim if he is not obliged to take proceedings far from his place of residence, with all the costs and uncertainties that entails. A third possibility might be the courts of the place where the claimant has his habitual residence, is domiciled, or has his principal place of business, for the reasons just mentioned in connection with the previous alternative. On the other hand, there would seem to be no good reason for allowing as a fourth option the courts of the place where response measures are taken, since everything would indicate that in the great majority of cases they would be taken in the territory either of the State of origin or of the affected State, and it is not worthwhile to allow for the somewhat remote possibility that they might be adopted in a third country.

2. Proposed text

64. In the light of the foregoing, the Special Rapporteur proposes the following article:

"Competent court

Actions for compensation of damages attaching to the civil liability of the operator may be brought only in the competent courts of a State party that is either the affected State, the State of origin or the State where the liable operator has his domicile or residence or principal place of business."

F. Application of domestic law without discrimination

1. Explanatory comments

65. National law should be applied to complement the draft articles in questions not dealt with by the latter, naturally in a way that is faithful to both the letter and the spirit and intent of the draft articles. By national law we mean here the law applied by the competent court in hearing such a case.

66. The non-discrimination principle proposed in draft article 10 reads:

> "States parties shall treat the effects of an activity that arise in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of these articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by the activities referred to in article 1."

The second sentence would seem to be fully applicable to the chapter on civil liability and finds a precedent, inter alia, in article 14 (c) of the Paris Convention on nuclear damage. 11/ In the sixth report 12/ in article 30 on the application of national law, we introduced a paragraph following the Paris wording, to the effect that both the draft articles and national law and legislation should be applied without any discrimination based on nationality, domicile or residence. We acknowledge, however, that if article 10 is accepted in the form proposed, it will be unnecessary to repeat the second half of it in the chapter on liability.

2. Proposed text

67. In the light of the foregoing, the Special Rapporteur proposes the following articles:

"Article E

Domestic remedies

> The Parties shall provide in their domestic law for judicial remedies that allow for prompt and adequate compensation or other relief for the harm caused by the activities referred to in article 1."

11/ "Le droit et la législation nationale doivent être appliqués sans aucune discrimination fondée sur la nationalité, le domicile ou la résidence."

12/ A/CN.4/428, para. 67, and annex.

"Article F

Application of national law

The competent courts shall apply their national law in all matters of substance or procedure not specifically dealt with in these articles."

G. Causality

1. Explanatory comments

68. Article 10 of the Council of Europe Convention contains a provision 13/ similar to that found in the domestic law of some countries, to the effect that the court, when considering evidence of a causal link between acts and consequences, must take due account of the increased danger of damage inherent in the dangerous activity in the course of which the act was committed. The accompanying explanatory report 14/ states:

> "This Article encourages the Court, when it considers the evidence concerning the causal link between the incident and the damage or, in the context of a site for permanent deposit of waste, between the activity and the damage, to take account of the increased risk of damage from a specific dangerous activity. In order to assist the person suffering damage to obtain compensation, account is taken of the specific risks created by certain dangerous activities of causing a given type of damage. The Convention does not create a true presumption of a causal link. The provision operates as a complement to the system of strict liability. It therefore forms part of all the rules which are designed to assist the person who has suffered damage to prove the causal link which may, in practice, be difficult."

69. In an interesting document entitled "Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green paper on remedying environmental damage" 15/ item 2.1.8. on problems of proving causation states: "To obtain compensation for damage, the injured party must prove that the damage was caused by an act of the liable party, or by an incident for which the liable party was responsible. Special problems arise in the case of environmental damage. As discussed in the section on chronic pollution, establishing a causal connection may not be possible if the damage is the result of activities of many different parties. Difficulties also arise if

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13/ "Lorsqu'il apprécie la preuve du lien de causalité entre l'événement et le dommage ou, dans le cadre d'une activité dangereuse définie à l'article 2, paragraphe 1, alinéa d), entre cette activité et le dommage, le juge tient dûment compte du risque accru de provoquer le dommage inhérent à l'activité dangereuse."

14/ Contained in the addendum to CDCJ (92) 50, p. 35.

15/ Document COM (93) 47 final, Brussels, 14 May 1993, p. 10.

the damage does not manifest [itself] until after a lapse of time. Finally, the state of science regarding the causal link between exposure to pollution and damage is highly uncertain. The liable party may try to refute the injured party's evidence of causality with alternate scientific explanations for the damage."

2. Proposed text

70. We feel that a similar provision could be proposed to the Commission as article H, since it would be in keeping with the spirit of our articles, which aim to make it easier for an innocent victim to bring action for compensation for the harm he has sustained. Since we have not yet decided whether or not an activity involving a site for permanent deposit of waste should or should not form a specific part of the definition of dangerous activities, for the time being the wording should not cover that possibility. It will be very important to emphasize, however, perhaps in the commentary, that such an article does not create a presumption of causality between incident and harm.

"Article H

When considering evidence of the causal link between the incident and the harm, the court shall take due account of the increased danger of causing such harm inherent in the dangerous activity."

H. Enforceability of the judgement

1. Explanatory comments

71. Conventions on civil liability normally include some type of provision on the enforceability of the judgement, and we feel that such a provision should also be included in our articles, since they are general (they attempt to cover all dangerous activities involving significant risk) and global (as opposed to regional) in nature. Indeed, these characteristics make it necessary to take into account considerable differences in the concept of public policy in the different countries to which the article would apply, and in the other possibilities covered in the article which we are proposing.

72. The Paris Convention on nuclear damage (art. 13, para. (e)), states that:

"Judgments entered by the competent court under this article after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments."

73. For its part, the Vienna Convention on the same subject states (art. XII):

"1. A final judgment entered by a court having jurisdiction under article XI shall be recognized within the territory of any other Contracting Party, except:

(a) where the judgment was obtained by fraud;

(b) where the party against whom the judgment was pronounced was not give a fair opportunity to present his case; or

(c) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

2. A final judgment which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgment of a court of that Contracting Party.

3. The merits of a claim on which the judgment has been given shall not be subject to further proceedings."

74. Likewise, CRTD (art. 20) provides that:

"1. Any judgment given by a court with jurisdiction in accordance with article 19 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

(a) where the judgment was obtained by fraud; or

(b) where the defendant was not given reasonable notice and a fair opportunity to present his case; or

(c) where the judgment is irreconcilable with an earlier judgment given in the State where the recognition is sought, or given in another State Party with jurisdiction in accordance with article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties.

2. A judgment recognized under paragraph 1 of this article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened."

This text does not include the ground of public policy, but on the other hand includes in paragraph 1 (c) irreconcilability with an earlier contrary judgement if it was given in the State in which recognition is sought and involves the same cause of action and the same parties. The explanatory report does not give

a good reason for this change, except that an attempt was made to limit the number of grounds as far as possible. 16/

75. The Council of Europe Convention contains a similar provision (art. 23), which reinstates the ground of public policy, omits the ground of fraud and adds the ground of irreconcilability with an earlier "decision given in a dispute between the same parties in the Party in which recognition is sought" and also in another State when that "decision fulfils the conditions necessary for its recognition in the Party addressed". The explanatory report 17/ indicates that the rules are based on the Brussels Convention (27 September 1968) and the Lugano Convention (16 September 1988).

2. Proposed text

76. In the light of the foregoing, the Special Rapporteur proposes the following article:

"Article I

Enforceability of the judgement

1. Where the final judgements entered by the competent court are enforceable under the laws applied by such court, they shall be recognized in the territory of any other Contracting Party unless:

(a) The judgement was obtained by fraud;

(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

(c) The judgement was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

(d) The judgement was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject and between the same parties.

2. A judgement recognized under the paragraph above shall be enforced in any of the Member States as soon as the formalities required by the Member State in enforcement is being sought have been met. No further review of the merits of the case shall be permitted."

16/ Document ECE/TRANS.84, p. 52, para. 126.

17/ Contained in the addendum to document CDCJ (92) 50.

I. Exceptions to liability

1. Explanatory comments

77. We said the following in the sixth report: 18/

> "The existence of special cases in which there is no liability, or in which liability is not applicable to certain persons in certain circumstances, is common to most of the conventions on liability for harm resulting from specific activities, whether we are talking about civil liability or State liability, even if the liability is absolute or strict. Thus, the Convention on International Liability for Damage Caused by Space Objects, which establishes the liability of the State for such damage, states that exoneration from absolute liability shall be granted 'to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of the claimant State or of natural or juridical persons it represents'. These are the only grounds for exoneration from liability envisaged in that Convention. The other conventions incorporate more grounds for exoneration. They are based on the 'channelling' of strict liability towards the operator, who is made solely responsible for the harm ... Article IV (2) of the 1963 Vienna Convention on civil liability for nuclear damage provides for an exception similar to the one referred to above in cases involving 'gross negligence' or an 'act or omission ... done with intent to cause damage' on the part of the apparent victim but leaves it up to the court to grant this exception, provided that it is in keeping with the national law. Article IV (3), on the other hand, allows an unrestricted exception in respect of nuclear damage caused by a nuclear incident directly due to (a) 'an act of armed conflict, hostilities, civil war or insurrection"

or a grave natural disaster of an exceptional character, except in so far as national legislation may provide to the contrary.

78. The report continues as follows:

> "Under article 8 (4) of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, an operator shall not be liable if it proves that
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> 'the damage has been caused directly by, and to the extent that it has been caused directly by:
>
> (a) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character which could not reasonably have been foreseen; or

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18/ A/CN.4/428, paras. 56, 57, 58 and 59.

(b) armed conflict, should it occur notwithstanding the Antarctic Treaty, or an act of terrorism directed against the activities of the Operator, against which no reasonable precautionary measures could have been effective.'

Under article 8 (6), the Convention adds:

'If an Operator proves that damage has been caused totally or in part by an intentional or grossly negligent act or omission of the party seeking redress, that Operator may be relieved totally or in part from its obligation to pay compensation in respect of the damage suffered by such party'.

Several important drafts under consideration in various forums also make similar exceptions. Mention has already been made of the draft rules of the European Committee on Legal Co-operation of the Council of Europe, prepared by the Committee of Experts on Compensation for Damage to the Environment. Rule 3, concerning the liability of the operator, states that the operator shall not be liable: (a) if the damage results solely from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable or irresistible character; or (b) if the damage is caused solely by an act of a third party done with intent to cause damage, despite safety measures appropriate to the type of dangerous activity in question; or (c) the damage was caused solely by an act carried out pursuant to an express order or decisions of a public authority."

79. Lastly, the report states:

"Article 5 (4) of the ECE draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels states that no liability shall attach to the carrier if he proves that:

'(a) The damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) The damage was wholly caused by an act or omission done with the intent to cause damage by a third party';

while article 5 (5) states that:

'If the carrier proves that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the carrier may be exonerated wholly or partially from his liability to such person.'"

80. With regard to the two drafts mentioned in the sixth report, each of which subsequently became a convention, we should add that the Council of Europe Convention, cited many times in this report, in its final text includes these three grounds for exemption from liability, and adds two other grounds relating

to when the damage: "(d) was caused by pollution at tolerable levels under local relevant circumstances; or (e) was caused by a dangerous activity taken lawfully in the interests of the person who suffered the damage, whereby it was reasonable towards this person to expose him to the risks of the dangerous activity". The second draft became CRTD, also referred to in this report; article 5, paragraph 4, reproduces textually the grounds mentioned, and adds another ground relevant to an instrument on transport: "The consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature". Paragraph 5 of article 5 remained unchanged.

81. The most recent attempts follow the same general lines as the conventions we have just discussed. The draft protocol on liability to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal includes a paragraph 4 in its article 4 on liability which reads as follows:

> "There shall be no liability if the damage is:
>
> (a) a result of an unforeseeable act of armed conflict, hostilities, civil war or insurrection;
>
> (b) a result of an unforeseeable natural phenomenon of an exceptional, inevitable and irresistible character;
>
> (c) a result of the wrongful intentional conduct of a third party which is the sole cause of damage taking into account that all reasonable safety measures have been taken, to prevent the consequences of such conduct;
>
> (d) a result of compliance with a specific order or compulsory measure of a public authority."

And paragraph 5 reads as follows:

> "Compensation may be reduced [or disallowed] if the person who suffered damage or a person for whom he is responsible under national law has, by his own fault, contributed to [or is the sole cause of] the damage having regard to all circumstances."

As may be seen, the grounds for exemption from liability are defined a little more strictly in this draft, although it remains to be seen whether this tendency will be confirmed in the final text.

82. With regard to the liability of the State for compensation, if that liability derives from a wrongful act the grounds for exemption from wrongfulness laid down in part 1 of the Commission's draft which are applicable would prevail. If the regime of the nuclear conventions is followed, the liability of the State would be of the same nature as that of the private party from which it derives and then the same grounds for exemption would apply to the State as to the operator and State liability for the amounts due would be treated in the same way as the liability of the operator. Lastly, if the third alternative put forward is preferred, that is to say, non-liability on the part

of the State for incidents, the relationship would be between State and State, as we saw, and the grounds for exemption from wrongfulness in part 1 would be applicable.

2. Proposed text

83. In the light of the foregoing, the Special Rapporteur proposes the following article:

"Article J

Exemptions

1. The operator shall not be liable:

(a) If the harm was directly attributable to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm was wholly caused by an act or omission done with the intent to cause harm by a third party.

2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person."

V. COMMON PROVISION ON STATE LIABILITY AND CIVIL LIABILITY

A. Explanatory comments

84. The limitation on proceedings in respect of liability should apply equally to liability arising from wrongful acts and to strict liability. In our sixth report 19/ we said the following in order to provide a basis for article 27 as proposed in that report:

"It is also common to set a time-limit after which proceedings in respect of liability lapse. The conventions cited as a basis for the preceding article may also be invoked here. Article X of the Convention on International Liability for Damage Caused by Space Objects establishes time-limits as follows:

'1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

19/ A/CN.4/428, paras. 60-61.

'2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.'

"Article VI of the 1963 Vienna Convention on civil liability for nuclear damage establishes a time-limit of 10 years from the date of the nuclear incident which caused the damage, as does the 1960 Paris Convention. Rule 6 of the Council of Europe draft rules establishes a time-limit of three to five years (still to be decided) from the date on which the affected party learned or could reasonably be expected to have learned of the damage and of the identity of the operator. In no event can proceedings be brought once 30 years have elapsed since the date of the accident. Article 18 of the ECE draft Convention on civil liability for damage caused during carriage of dangerous goods by road, rail and inland navigation vessels sets a time-limit of three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier."

85. It should be added that the texts cited as drafts are now conventions. The Council of Europe Convention on Civil Liability for activities dangerous to the environment takes up the issue in its article 17, whose first paragraph sets a limit of three years "from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator. The laws of the Parties regulating suspension or interruption of limitation periods shall apply to the limitation period prescribed in this paragraph. (2) However, in no case shall actions be brought after thirty years from the date of the incident which caused the damage. Where the incident consists of a continuous occurrence the thirty years' period shall run from the end of that occurrence. Where the incident consists of a series of occurrences having the same origin the thirty years' period shall run from the date of the last of such occurrences." CRTD, which succeeded the above-mentioned draft on civil liability for damage caused during carriage of dangerous goods, sets the period during which action may be brought at three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier. The period may be extended if the parties so agree after the incident. In no case may an action be brought after 10 years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the periods run from the date of the last of such occurrences.

86. The commentary in the explanatory report 20/ recognizes as precedents, among others, article 10, paragraph 2, of the 1985 European directive on product liability.

20/ ECE/TRANS/84, paras. 119-120.

"There was however some disagreement as to the establishment in paragraph 2 of a second limitation period, running from the date of the incident which caused the damage. While some support was expressed for imposing no limit, as is the case under the European directive referred to above, a majority of governmental delegations favoured the introduction of such a limit, ultimately agreed upon as ten years, which was considered to be long enough to provide adequate protection to victims, without creating the difficulties which would be faced by insurers if the period were to be too lengthy, as they would have to maintain the necessary reserves to meet their eventual liability, and by those responsible for the distribution of the limitation fund if claims could be brought too many years after the incident."

In the following paragraph (para. 120), the explanatory report indicates that the interruption or suspension of actions will be regulated by national law, as in the case of article 10, paragraph 2, of the above-mentioned European directive.

87. A limitation period of three years for the application of the "discovery rule" is reasonable. In the nuclear field, however, the period is 10 years because some of the damage caused by radiation, for example, takes a relatively long time to appear. As to the maximum limit for presentation of claims, 10 years may be appropriate for such instruments as CRTD but too short for situations that could arise in the case of other instruments, such as the nuclear conventions, which specify a time-limit of 30 years. As we have seen, the Council of Europe Convention sets the same limit on all activities dangerous to the environment. This time-limit appears to be appropriate for our articles, which also deal with dangerous activities in general.

B. Proposed text

88. In the light of the foregoing, the Special Rapporteur proposes the following article:

"Article K

Time-limits

Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once thirty years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous occurrence, the periods in question shall run from the date on which the incident began and where it consisted of a series of occurrences having the same origin, the periods in question shall run from the date of the last occurrence."

VI. PROCEDURAL CHANNELS

A. Introduction

89. Although the present report does not propose specific articles on procedures to enforce the liability dealt with in the draft articles, the Special Rapporteur believes it would be useful to consider the subject so that he can assess Commission members reactions and thus be better prepared to formulate articles later on. The advantages and disadvantages of each of the possible procedural channels may play a crucial role in the acceptance by States of the liability regimes considered by us earlier. For example, the State's residual liability for a wrongful act, in the context of compensation for harm arising from incidents, as set forth in the draft protocol to the Basel Convention, may present procedural difficulties that outweigh the advantages, because it places the State vis-à-vis private parties in the framework in question.

B. Consideration of procedural channels

90. We shall attempt to consider the various possibilities at hand.

1. Affected State versus State of origin

91. Firstly, we shall consider the State-to-State channel; there are two alternatives, whereby the State either functions as the exclusive party entitled to bring action, because it incurred direct harm, or acts for and on behalf of its nationals who have incurred direct harm. With regard to the latter case, opting for the protection of individuals by their own States through the diplomatic channel presents drawbacks. Under international law, making a claim depends solely upon the State in question; here a troubling factor arises, since the State may not consider it expedient to make a claim, owing to the particular circumstances that apply or on foreign policy grounds. The diplomatic channel could thus deprive injured parties of the guarantees of due process before an ordinary court, and payment of compensation would depend on negotiations between States and possible compromises entered into for reasons that may be alien to the principle of restitutio in integrum.

92. Furthermore, diplomatic protection is granted when injured parties have no other recourse, because they are subject to the jurisdiction of the State in respect of which they are seeking protection and have exhausted domestic remedies. However, our draft is applicable at an earlier stage of the process in question, and opens up the main channel for action, enabling them to obtain compensation on the basis of civil liability. Let us therefore consider excluding at an initial stage from the regime laid down in the draft articles the principle whereby the State provides protection to its injured nationals. In short, in such an event the State-to-State channel would apply when the affected State is the party entitled to bring action and when the State of origin is the party directly liable. The first situation would obtain when the property or environment of the affected State is directly affected. The second situation would obtain in two cases: when the State is liable owing to failure

to fulfil obligations of prevention; and when the State is residually liable, either through the commission of a wrongful act or in accordance with the principle of strict liability.

93. Let us expand on the possibilities of the State-to-State channel:

(a) Compensation for incidents resulting from dangerous activities

94. Let us first hypothesize that a State has been directly affected through harm to its property, and, as the party so entitled, brings action against another State. This occurs, for instance, when the harm affects the environment per se. 21/ This concept of harm to the environment calls for further comment. The State is deemed to be the party entitled to bring action because the environment does not belong to anyone in particular, but to everyone, to society, to the national community which the State embodies. In the proposal put forward by the Commission of the European Communities for a Council directive, 22/ concerning civil liability for damage caused by wastes, item 6 indicates that: The concept of liability introduced covers ... damage to the environment; such damage should be put in a new category separate from the preceding ones; and damage to the environment affects society more than it does the individual. The French delegation, for its part, in an informal paper circulated in the IAEA working group on liability for nuclear damage, 23/ makes the following points: this is damage to things that cannot be appropriated, that are common property and belong to no one in particular, but can be used by all - such things as air, water and space; damage of this kind is not restricted to nuclear energy, but occurs frequently in industries that produce pollution through accidents, requiring funds for clean-up and restoration of the sites in question to their original state; such measures are usually undertaken by public authorities, which intervene to protect people and property.

95. If the harm under discussion is caused by private operators, the claimant State will have to contend only with the State of origin if the latter is residually liable in accordance with one of the two alternatives set forth above, either (i) directly, for the sums not covered by the operator or his insurance policy (principle adopted in the nuclear conventions), or (ii) for the same sums, but only if the harm would not have occurred if the State of origin

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21/ It is important to distinguish between harm to the environment per se and harm to private individuals or their property caused as a result of harm to the environment. The latter would cover, for instance, damnum emergenis arising from the pollution of water that poisons people who drink it, or the lucrum cessans incurred by the owner of a hotel who has no guests because of polluted air in the region.

22/ Com (82) 282 final-SYN 217.

23/ "Observations sur les questions mentionnées au paragraphe 7 du rapport du Groupe de travail sur la responsabilité pour les dommages nucléaires, p. 2 'Notion de dommage nucléaire'." Session held from 30 October to 3 November 1989 in Vienna.

had not failed to fulfil its obligations (principle adopted in the draft protocol to the Basel Convention). The defendant-State hypothesis will of course not apply if the third alternative set forth above is accepted, according to which the State of origin would under no circumstances be liable for harm arising from incidents resulting from the activities of private individuals within its territory or otherwise under its jurisdiction or control.

96. In the case of alternative (i), it would seem that a judgement rendered by a court requiring a private operator to pay a certain sum could - once it has been demonstrated that that payment is not forthcoming - serve as a basis for the court to declare the debt payable by the State. In principle, the State's appearance, as a sovereign territorial entity, before a domestic court should pose no difficulties: the system is comparable to that involving private parties vis-à-vis other private parties. Residual State liability for sums not covered by the operator liable or by his insurance is intrinsically the same as the liability of the private party that the State is assuming: the conventions establish no special exception or defence for the State. Since the proceedings instituted against the private party were in respect of strict liability, the issues of fault or breach of obligations do not arise. The judgement rendered by the court becomes applicable to the State, which must comply with the portion of the judgement that pertains to it, if such exists. The judgement cannot, of course, be judicially enforced against the liable State if the general parameters of the jurisdictional immunity of States are to be respected.

97. In the case of alternative (ii), however, greater difficulties arise. As we mentioned earlier, the State is also residually liable for the sums in question, in the same way that it is under the nuclear conventions, but only if the harm was not caused by failure to fulfil obligations of prevention. This is liability for a wrongful act, and it is therefore necessary to prove in the proceedings both (a) that the State failed to fulfil certain obligations, and (b) that there is an indirect causal link, i.e. that the harm occurred because the State failed to fulfil its obligations.

98. But the State seems to have acted as a sovereign territorial entity, jure imperii, in several such cases, such as when it failed to enact a law requiring the operator to adopt measures to prevent the harm. As we have seen, States are reluctant to submit to domestic courts or, in any event, to waive their immunities, which poses a problem in this instance. 24/

99. Private parties or their property can suffer harm - such as injury to health or some other damnum emergens - as a result of harm to the environment; such injured parties would be the parties entitled to bring action since the harm in question is common harm as differentiated from harm to the environment - and the channel open to them would be before a domestic court in the State of origin, against the operator liable. If the harm is caused by the State, acting as the operator in connection with the activity in question, the case should be

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24/ The standing committee for considering the amendment of the Paris and Vienna Conventions on nuclear damage encountered the same difficulty and reached the same conclusion.

equated with that of an affected State against private operators, because the operator State is acting jure gestionis.

(b) Issues not related to compensation for harm caused by incidents

100. The relevant chapter would cover the liability of the State of origin for failure to fulfil its obligations of prevention, apart from compensation owed as a result of incidents caused by activities involving risk. This might include, as we saw earlier, compensation for harm not resulting from incidents, such as compensation for reasonable precautionary measures that the exposed State had to take as a result of the risk created and of the failure of the State of origin to take the preventive measures required by the draft articles. The obligations in question are those that the State of origin has assumed at an international level towards the other States participating in the regime laid down in our articles, and the corresponding action must therefore be taken by one State against another through diplomatic channels. Most such action might be intended, for example, to compel the State of origin to adopt appropriate laws requiring operators to take certain precautionary measures, or to enforce an existing law, or to carry out the impact assessment stipulated in article 12 on the risks entailed by a given activity, and the like. If international disputes should arise, they would be settled in the manner which will ultimately be proposed in the appropriate chapter of the articles.

2. Private injured parties versus the State of origin

101. If the State is liable because the incident that caused the harm resulted from an activity involving risk performed by the State itself acting jure gestionis or by a State enterprise, the situation would be analogous to that of a private party versus another private party.

102. A case where the State appeared as defendant against private injured parties would not arise if the system were to be adopted whereby the State of origin would in no instance be liable for harm caused by incidents resulting from activities within its territory or otherwise under its jurisdiction or control, because the State's liability arising from failure to fulfil its obligations of prevention, as we have seen, would be handled in a different manner, through diplomatic channels.

103. All that would remain, then, would be the State's residual liability in its two variants, liability for a wrongful act or strict liability.

104. The possibility of residual State liability for a wrongful act, brings us back to the hypothesis that the State may appear as a party in domestic courts. If in such a situation the competent domestic courts were held to be the appropriate channel, it would be necessary to stipulate in the articles that the State could not plead jurisdictional immunity, for otherwise the system could not function. On the other hand, we have already seen that the concepts of the State's residual and strict liability do not raise the problem of judging the conduct of the State.

3. Affected State versus private parties

105. Only in instances where there was immediate harm to the State with respect to its property or environment might our articles direct the affected State to take proceedings against the private parties liable for the harm rather than against the State of origin. In such circumstances, the affected State might be obliged to take proceedings in domestic courts, possibly those of the State of origin. When a State is a party to proceedings, it makes it difficult to use domestic courts, although they function quite well when both claimant and defendant are private parties. The Council of Europe Convention on Civil Liability for damage resulting from activities dangerous to the environment makes domestic courts competent to hear all cases involving action for compensation. It makes no distinction on the basis of whether the claimant or defendant happens to be a private party or a State. It should be borne in mind, however, that this Convention applies within the framework of the European Community between States that are very similar politically and socially, making it feasible to assume an equal footing. However, when a similar issue arose in connection with nuclear matters and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, there were reservations about whether States would find a similar solution acceptable. As an additional argument against such a solution, it was pointed out that domestic courts might encounter difficulties in dealing with issues such as harm to the environment; for this reason, the draft protocol on liability to the Basel Convention 25/ proposes that for assessment of clean-up and remedial action costs and evaluation of environmental damage, an internationalized approach should be considered, for example, domestic courts assisted by an international technical advisory body to be consulted on an optional or mandatory basis (art. X, para. 28 (a)).

106. The Special Rapporteur sees two alternatives with regard to using the channel of the domestic courts in cases where the claimant is a State:
(a) provision in the articles for the jurisdiction of domestic courts, assisted or not assisted in the manner described at the end of the paragraph above; or
(b) establishment of a single forum for all disputes, whether between States, between private parties and States or between private parties, such as a claims commission along the lines of that proposed by the Netherlands in the IAEA standing committee. The Netherlands proposal considers various approaches to obtaining compensation for nuclear damage; under item I it deals with the civil liability of the operator of a nuclear installation invoked by (i) private parties or States in respect of damage suffered or (ii) a State acting on behalf of private parties or subrogated to the rights of private parties in respect of damage they have suffered. The advantages offered by a single forum consisting of a tribunal in the form of an international claims commission would be as follows:

25/ Ad hoc working group of legal and technical experts to develop elements which might be included in a protocol on liability and compensation for damage resulting from transboundary movements and disposal of hazardous and other wastes. Nairobi meeting, 9 March 1991, UNEP/CHW.1/WG.1/1/3, p. 2.

- All claims would be recorded in one place, allowing for a general review of all of them;

- There would be consistency as regards the concepts of "incident" and "nuclear damage" for which compensation is being claimed;

- There would be consistency as regards the time-limits within which claims for compensation must be filed;

- There would be consistency as regards grounds for exceptions;

- The same types of compensation would be paid by the same sources up to a certain ceiling within an equitable distribution system.

107. According to this proposal, which deals with nuclear damage, the tribunal would be constituted only after an incident had occurred and would consist of a number of arbitrators chosen by the installation State ("Installation State"), an equal number chosen by the claimant State or States and a number of arbitrators chosen by agreement between the installation State and the claimant State or States. It would hear claims by private parties and/or States against the operator or claims by injured States against the installation State. The mechanism suggested would make it possible to apply both regimes: civil liability and strict liability of the State. States potentially liable could declare (at the time of signing or ratifying the pertinent international instrument, for example) that they recognize the jurisdiction of the tribunal over claims brought against a defendant State (but not against an operator), either by a claimant State (or claimant States) only, or by private parties as well. The international and judicial nature of the tribunal (ISCT) would ensure a fair and impartial settlement of claims (even between States).

108. Aware that the above-mentioned proposal met with some resistance from States members of the IAEA standing committee, because of the reluctance of States to be compelled to submit their disputes to such a forum, the working group considering a draft protocol on liability to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal suggested borrowing the concept of a claims commission for its draft, but with one change: the State of origin - that is, the potential defendant State - would be given the option of requesting at the time an incident occurred that a claims commission with exclusive jurisdiction be established.

4. Private injured parties versus private liable parties

109. Such a situation involves civil liability, for which domestic courts are fully competent.